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ABSTRACT

The status of litigation involving dismissals of tenured faculty for reasons of incompetence, broadly defined, is evaluated. In practice, there is no consensus within higher education as to what constitutes adequate cause based on incompetence for dismissal of faculty members. The following issues are explored: (1) the pattern of increasing litigation; (2) patterns of litigation by institutional type; (3) forums for disputing these litigations; (4) prevailing parties to the dispute; (5) procedural issues that have been litigated; (6) substantative issues that have been litigated; (7) subcategories of behavior alleged to be incompetent; and (8) the role of the court in resolving disputes over faculty dismissals. All recorded court decisions which resulted in the dismissal of a tenured faculty member in a postsecondary institution for reasons of incompetence from January 1960 through March 1988 were surveyed. The resulting patterns of litigation are discussed, providing perspectives about the court's role in disputes over evaluation of tenured faculty. The growing judicial involvement--state and federal--in such decisions, and variation in litigation by type of institution are discussed. The fairly strong position of institutions involved in litigation is confirmed. The caselaw illustrates the importance of procedural issues in litigating. Classification of the cases on dismissal for incompetence into three subcategories (incompetence, insubordination, and neglect of duty) sheds some light on litigation patterns and strategies. Contains 55 references and 9 tables. (SM)

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DISMISSALS OF TENURED FACULTY FOR INCOMPETENCE: AN ANALYSIS OF LITIGATION PATTERNS

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I. INTRODUCTION

Tenure in higher education is an employment policy designed to ensure against the infringement of academic freedom to teach and to pursue knowledge. Tenure does not protect faculty from a fair assessment by their employer of their competence in fulfilling their assigned duties. The American Association of University Professors has acknowledged in its 1940 Statement on Academic Freedom and Tenure that dismissal of tenured faculty is permissible only for "adequate cause" (AAUP, 1977). Close examination of these documents sets forth "incompetence" as one of the two specified causes for termination.* In its 1958 Statement on Procedural Standards for Faculty Dismissal Proceedings, the AAUP assigned responsibility for further definition of adequate cause to individual institutions of higher education (AAUP, 1977).

In practice there is no broad consensus within higher education as to what constitutes adequate cause based on incompetence for dismissal of faculty members (Kaplin, 1985; Keast, 1973; Lovain, 1984). The literature suggests three subcategories of the term incompetence as generally described in AAUP documents: incompetence, insubordination and neglect of duty (Hendrickson, 1988; Lovain, 1984). Institutional definitions also are vague (Keast, 1973). Such a vacuum invites speculation about the willingness of courts to supply or interpret substantive definitions of incompetence in litigation involving dismissals of tenured faculty for this cause (Brown, 1977).

Refinement in methodologies available to analyze the role of law in a specific policy area has expanded analysis of the law beyond the stage of descriptions of court decisions and projections of future rulings (Note, 1982; Zirkel, 1983; Helms, 1987). Outcomes analysis, relying on analysis of patterns of court decisions viewed as aggregated data, permit generalizations about the role of courts in policy areas. Such analysis also permits identification of trends over time and a better understanding of the legal environment in which higher education functions.

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*Moral turpitude is the other cause for termination set forth in these documents.

This research evaluates the status of litigation involving dismissals of tenured faculty for reasons of incompetence, broadly defined. Employing outcomes analysis to a survey of caselaw, this study is designed to answer the following questions:

1. Is there a pattern of increasing litigation?
2. Is there a pattern of litigation by institutional type?
3. In what forum are these disputes litigated?
4. Which party to the dispute prevails?
5. What procedural issues have been litigated?
6. What substantive issues have been litigated?
7. What subcategories of behavior alleged to be incompetent can be identified?
8. What is the role of the court in resolving disputes over faculty dismissals?

II. METHODOLOGY

This study surveys all recorded court decisions from January, 1960, through March, 1988, in which the dismissal of a tenured faculty member in a postsecondary institution for reasons of incompetence, broadly construed, was at issue. It includes all decisions set forth in both the federal and 50 state court systems. State court reporter systems contain, however, only appellate court decisions. There is no reporting system to identify in any systematic manner cases filed by subject matter, issue or even by decision rendered at the district (trial) court level in state judicial systems. Consequently, for state caselaw data only those cases persisting through to the appellate level are available for analysis.

Cases were identified through a key word identification search of the WESTLAW and LEXIS computerized caselaw data bases. Only the decision from the last court litigating the case in question was included. Criteria for inclusion in this study required that the faculty member be tenured, that the case involve dismissal from employment status as a faculty member, and that adequate cause for dismissal be at issue in the case. All cases involving any question as to the conferring of tenure status of a faculty member were excluded. At some point in the text of each decision there is a clear indication that the faculty member has previously obtained tenure.

Next, cases dealing with dismissal based on immorality, the other substantive cause

accepted by the AAUP, were excluded. Behavior involving dishonesty, sexual harassment or misconduct and vulgarity was defined as immoral although the term immoral or moral turpitude did appear in every excluded case. This left all the cases in which, for purposes of this research, dismissal was assumed to be based on incompetence, as broadly construed by the AAUP.[1] The term incompetence does not necessarily occur in the opinion accompanying each decision. All cases identified are included in the general analysis of dismissal for cause and assigned to appropriate subcategories only at the point in the analysis where distinctions between more specific behaviors constituting incompetence are examined. In this way all cases alleging adequate cause for dismissal except those alleging moral turpitude are included in this survey.

The cases were then analyzed to determine the answers to the research questions. Most information reported in this study simply aggregates findings according to previously identified categories: frequency of litigation; type and level of postsecondary institutions involved; prevailing party; court system, and type of issue litigated. Closer analysis was required to determine the balance of substantive and procedural issues in the case as well as subcategorization of the types of incompetence in question. The most complex issue posed by this research is that of the degree to which courts have deferred to an institution's substantive definitions of incompetence and to its procedural practices employed in the dismissal. Here careful evaluation of both judicial holdings and reasonings was necessary to assess the role of the court in resolving disputes over faculty dismissals.

III. RESULTS: PATTERNS OF LITIGATION

A. Frequency of cases

Since 1960 the number of cases involving dismissal of tenured faculty for reasons of incompetence has grown, in particular, during the decade between 1975-85. This increase may now be stabilizing. No cases were litigated between 1960-70. Only three cases

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[1]Three cases, Harden, Jawa and Martine, alleged both incompetence and immorality as causes for dismissal.

occurred between 1971-75 (Adamian, 1975; Bowing, 1975; Saunders, 1975). This limited experience with litigation was altered during the next decade as 23 cases on this topic were addressed by the courts. Whether this rather substantial increase in the volume of litigation represents a trend toward continuing recourse to the courts or is a temporary surge is unclear at this point. The 1986-1988 period appears, however, to point to some stabilization in the rate of litigation.

Table 1: Frequency of Litigation

Time Period	Cases
1960-65	0
1966-70	0
1971-75	3
1976-80	10
1981-85	13
1986-3/88	5
Total	31

While the data confirm that litigation over dismissal of tenured faculty for incompetence has increased substantally since 1975, a comparison of this finding with the environment in which higher education institutions operate provides some perspective for evaluation.

Table 2: Expansion of Higher Education Sector (Ottinger, 1984; Chronicle, 1988)

	Student Enrollment	Number of Institutions
1960	3,610,007	2,040
1970	8,649,368	2,573
1980	12,096,395	3,220
1988	12,500,798	3,406

During the period of this study enrollments in higher education more than tripled and institutions almost doubled in number. This expansion was more or less complete by 1980 with the passage of the "baby boom" cohort of students. Nonetheless a projected decline in enrollments for the 1980's has not occurred although some consolidation and shifting

within various sectors of higher education has been reported. Faculty employment patterns might be expected to respond in part to enrollment demands. Of the 288,520 full-time faculty members in public institutions and 102,211 in private institutions employed in 1988, 68.9% and 54.7% respectively are tenured (Chronicle, 1988). In the 5 year period between 1977-82, 16% of all institutions reported some retrenchment of faculty while more than half of these institutions indicated that they had systematically reviewed all tenured faculty (Ottinger, 1984). This would indicate that the higher education sector has undergone a period of major expansion and consolidation. Litigation patterns should be expected to reflect such changes. Perhaps, most notable is the finding that so little litigation occurred prior to 1975 and that the rate of litigation even after 1975 is relatively low. Only 2-3 cases per year arise in a field of 3,406 institutions employing approximately 255,000 faculty. For institutions this translates into approximately a 0.0006 to 0.0009 chance of becoming involved in such litigation each year--a small risk factor.

The data was further examined to ascertain if there are differences by state or region the cases are analyzed by state. There is no obvious pattern in the distribution of this litigation except that no cases occurred in the New England region.

B. Institutional characteristics

Two factors appear to be important in assessing institutional vulnerability to suit: its status as publicly or privately controlled and its type using an abbreviated Carnegie typology.

Whether an institution is public or private appears to provide some indication as to its vulnerability to suit. Only 3 or 9.7% of the cases litigated arose in the private sector. Of the 3,406 postsecondary institutions, there are 1,873 privates or 55% of the total. When analyzed by enrollment, however, private institutions account for only 22% of student enrollments and only 26% of full-time faculty employment (Chronicle, 1988). Such data point to a somewhat lowered incidence of litigation in the private sector proportional to number of institutions.

Table 3: Litigation by Institutional Type and Public or Private Status (Ottinger, 1984)

Institutional Type	Percent of All Institutions	Cases Against Publics	Cases Against Privates	Total Cases
Doctoral level	14%	7	1	8-26%
Comprehensive	22%	9	1	10-32%
General Baccalaureate	25%	5	1	6-19%
Two Year	40%	7	-	7-23%
Total	100%*	28 (90.3%)	3 (9.7%)	31-100%

*may not add to 100% due to rounding

Some explanation for this may derive from the fact that public institutions as instruments of the state are fully subject to the procedural and substantive constraints of the federal constitution. This creates a cause of action available to litigate in court. Private institutions, on the other hand, may offer such procedural and substantive protections as they bind themselves to through institutional policies and procedures. One of the three decisions (cf. Gray, Franklin, and McConnell) occurring in the private sector created an additional legal argument for future reference for those interested in circumventing the state action barrier to suing private institutions under the Fourteenth Amendment. In Gray v. Canisius the court required a private institution to provide procedural due process through a relatively new application of corporation law. It found that acceptance of a charter of incorporation create a "quasi governmental body" required to fulfill the obligations imposed on them by their own internal rules as well as those of the state.

Type of institution may further explain some of the difference in litigation rate between public and private institutions (Holbrook and Hearn, 1986). Nineteen percent of cases litigated involved baccalaureate institutions despite the fact that these institutions constitute 25% of the total--a somewhat lower rate of litigation, given enrollments for this category. This result may be due to two factors. First, there is a larger proportion of private institutions in this sector. Second, baccalaureate institutions may be smaller in size and simpler in organizational structure, thereby decreasing the potential

for procedural irregularities and initial mistakes in assessment (Blau, 1973; Clark, 1983; Cohen and March, 1974).

Similar small variations in "expected" rates of litigation can be identified for other sectors of higher education. Doctoral level institutions are involved in this type of litigation at almost twice the "expected" rate given actual numbers. This "overrepresentation" may be due to reasons of organizational complexity if, as the literature suggests, traditional values of academic freedom, disciplinary allegiance and decentralization of decision-making and faculty autonomy increase the difficulty of insuring procedural consistency and policy compliance (Baldridge et. al., 1978; Rubin, 1979; Ikenberry, 1972). Rates of litigation for comprehensive institutions, also somewhat subject to factors of organizational complexity, find themselves more frequently in litigation. Litigation involving community colleges, the most numerous institution in the higher education sector, is also not proportional. This finding may be due in part to staffing patterns which rely upon greater numbers of part-time and temporary faculty to retain flexibility in course offerings dependent upon shifting enrollments as well as smaller size.

C. Judicial forum

Plaintiffs in cases involving dismissal from tenured employment may have some choice of forum in which to litigate their claim. Frequently, several claims are at issue in one case and complex rules govern which court system and law applies. State administrative, statutory, constitutional and common law violations are resolved in state courts while federal statutory and constitutional issues are addressed in federal court. The following table indicates the highest level and court system in which the cases were litigated.

Cases involving dismissals of tenured faculty for incompetence appear to be litigated with almost equal frequency in state and in federal court systems. They may be somewhat misleading in that, given existing state judicial reporting systems, there is no way to ascertain the number of cases actually tried in state district courts but never appealed. There may be substantially more state cases than reported here. Table 4 illustrates an

Table 4: Judicial Forum and Level of Litigation

STATE	Supreme Court	5	FEDERAL	Supreme Court	0
	Appellate Courts	10		Circuit Courts	12
				District Courts	4
	Totals	15			16

inverse relationship between appeals in the federal court system and state systems. The frequency of cases persisting through to state supreme courts declines with higher levels. This does not appear to be the case in the federal court system. Litigants who have the option and choose to litigate in federal court appear to persist to the appellate level. The reasons for this are unclear although finances and the importance of the issue being contested may play some role. This finding must remain tentative until a methodology for counting number of cases tried in state district courts becomes available.

D. Prevailing party

The following table identifies the winner of each case. The category, unclear outcome, identifies those cases in which a prevailing party cannot be determined. Those include cases where the court split on the issues and ruled favorably for each side and where the outcome depends solely on a remand (cf. Bates, Bowing, Clarke and McConnell).

Table 5: Prevailing Party in Litigation

Faculty	-	5	(16%)
Institution	-	22	(71%)
Unclear	-	4	(13%)
Total		31	(100%)

Institutions prevail in court more than four times as often as faculty in litigation over dismissal for incompetence. These data illustrate the great difficulty for faculty in successfully litigating such issues and the basic discretion which courts accord to institutions in evaluating employee performance. Four of the five cases in which faculty prevailed were litigated in state court. Faculty prevailed in four of the 13 state cases

where an outcome could be determined (cf. Gray, Mahoney, Martine and Patterson) and in only one of the federal cases where an outcome could be determined (cf. Johnson, Pa.). This runs contrary to attorney "folklore" that federal courts are somewhat more receptive to plaintiffs' claims. At this time the number of faculty prevailing is too small to make generalizations about forum.

E. Procedural and substantive issues litigated

Two problems arising during the dismissal process form the subject for litigation: first, the procedures employed by the institution and, second, the substantive standards used to evaluate the actions triggering the dismissal. The focus of this research is the question of the degree to which courts have supplied procedural and substantive criteria for institutions in dismissals of tenured faculty for incompetence. The answer to this question first requires categorization of the cases. Some cases could be clearly identified as focusing primarily on either substantive or procedural issues. Other cases dealt with both types of issues with more or less a similar degree of attention and so are classified here as combined. These classifications, as presented in Table 6, reflect a basic judgment about each case since most cases attempt to develop several issues for the court as a matter of attorney strategy.

Table 6: Issues Litigated

Procedural	15	48%
Substantive	9	29%
Combined	7	23%
Total	31	100%

The caselaw confirms the key role of procedures in the dismissal process. In 71% of the cases the way in which the dismissal was handled became a cause of action for adjudication. This may also illustrate the general difficulty institutions of higher education have in creating and administering workable procedures in complex organizational settings. However, closer analysis of whether any specific institutional type was associated with more procedural litigation showed no differences. Procedural issues appear to be liti-

gated with some regularity across institutional type.

Only nine cases dealing primarily with the substantive standard used by the institution in dismissing a tenured faculty member have been litigated. Seven of these have occurred since 1980 with 5 of the 9 since 1985. Although it is too early to tell, courts may be somewhat more willing to address the issue of substantive standards for dismissal as experience with these litigation issue accumulates and a body of precedent develops.

Table 7: Issue Litigated, Time Period and Winner

	Substantive					Procedural					Combined					
Winner	1960-1975	76-80	81-85	86-	Total	1960-1975	76-80	81-85	86-	Total	1960-1975	76-80	81-85	86-	Total	Grand Total
Faculty	-	1	1	-	2	-	0	1	-	1	-	1	1	-	2	5
Instit.	1	1	2	3	7	-	5	5	1	11	1	1	2	-	4	22
Unclear	-	-	-	-	0	1	1	1	-	3	-	-	-	1	1	4
Totals	1	2	3	3	9	1	6	7	1	15	1	2	3	1	7	31

In general, analysis of the caselaw data shows limited variation over time, issue litigated and prevailing party. As the data in Table 7 indicate, faculty do not often prevail in court regardless of issue. Faculty have not won since 1986 and have only an overall success ratio of 1:3 in substantive cases, 1:10 in procedural cases and 1:2 in combined cases. There are too few cases upon which to make any assessment as to trends beyond this. It appears to be most difficult for faculty to succeed in litigation involving procedural issues alone. When substantive issues are combined with procedural challenges to dismissal faculty appear to maximize their limited chances of prevailing.

F. Categories of incompetence

Until this point in the analysis the term, incompetence, has been applied generically. Incompetence has been broadly defined as the lack of qualities needed for effective action. As such, incompetence is one of the two causes, not based on an economic rationale, deemed acceptable by the AAUP as a reason for dismissal if adequately substantiated. Cases involving the other "non economic" cause, moral turpitude, have not been

included in this analysis. In several places the literature identifies neglect of duty and insubordination separately as reasons for dismissal of tenured faculty (Hendrickson, 1988; Lovain, 1984). All cases specifying neglect of duty or insubordination as a cause for dismissal have been included in the analysis of incompetence to this point.

These categories will now be distinguished and described narrowly. The legal definition of incompetence is the fitness to discharge required duties (Black's Law Dictionary, 1979). For purposes of this classification incompetence will now be employed narrowly to describe dismissal based on some evaluation of actual performance in the primary areas of faculty responsibility, teaching and research. This term in its narrow usage is retained here so as to parallel its usage in the general literature. Insubordination is used to describe the failure to comply with the policies or directives of a superior (Black's Law Dictionary, 1979), the institution or some form of uncooperative and disruptive behavior. Neglect of duty is the failure to meet an obligation specified by the employer (Black's Law Dictionary, 1979). In the caselaw data a question arises in only one case where the facts are not clearly specified as to whether the behavior is attributable to insubordination or neglect of duty (cf. Garrett). This is indicated in the table below which classifies the facts of each case into three categories.

Table 8: Subcategories of Incompetence

Incompetence	Insubordination	Neglect of Duty	Total
10	14/15*	6/7*	31

* alternative figures depending on classification of Garrett which cannot be characterized

About half of the cases involve allegations of insubordination. This appears to be the most problematic category of cases. Issues of academic freedom and speech often become involved in disagreements between the faculty and administrators. To be balanced in each situation are the traditional duty of loyalty owed to an employer versus the protection accorded to speech and expression by the First Amendment. In eight of the 14/15 cases in the subcateogry of insubordination First Amendment issues were addressed at some

length by the courts (cf. Adamian, Franklin, Harden, Johnson (Pa.), Shaw, Sinnott, Smith, Stastny).

About one-third of the cases dealt directly with questions of faculty competence as a teacher and a researcher. Only one of these incompetence cases goes beyond the classroom to speak to the issue of evaluating faculty scholarship and research (cf., King). This group of cases provides the most helpful information for assessing the role of the courts in the evaluation of tenured faculty.

Neglect of duty cases are the least frequent. In all but two of the cases (cf., Akyeampong, Kalme) the distinction between neglect of duty and insubordination is not altogether clear and the characterization of the fact pattern which the court employs is the one applied here for analytic purposes only. These cases contain fact patterns where a faculty member fails or refuses to perform regularly assigned duties for some reason. In one of the most interesting cases in the survey a faculty member, arguing that institutions also have responsibilities to faculty, refused to conduct class until the institution exercised appropriate disciplinary measures against a disruptive study (cf. McConnell). These categories of faculty behavior constituting cause for dimissal are broken down in Table 9 into the factors analysed previously.

Table 9: Subcategories of Prevailing Party and Issue Litigated

	Prevailing Party			Issue Litigated		
	Faculty	Institution	Unclear	Substantive	Procedural	Combined
Incompetence	1	8	1	3	4	3
Insubordination	3	9/10	2	6	6/7	2
Neglect of duty	1	4/5	1	0	4/5	2
Totals	5	22	4	9	15	7

No major variations between categories are obvious except perhaps in the cases litigating insubordination. This group of cases seemed to produce somewhat more favorable results for faculty if unclear outcome implies at least another opportunity to litigate.

Similarly, insubordination cases alleging a substantive cause of action appear to rely upon First Amendment claims often available in such cases. No apparent differences with the findings reported earlier in Table 3 as to institutional type were identified.

G. Role of the court

Beyond the analysis of the caselaw as data, an evaluation of the judicial opinions in these cases can contribute to assessing the role of courts in litigation involving dismissal of tenured faculty for reason of incompetence. Judicial reasoning confirms the courts' willingness to allow some degree of discretion in the employing institution's decision-making both as to standards applied and procedures employed.

In those cases which discuss the substance of the subcategory of incompetence, the institution's assessment is generally sustained. In discharging a tenured faculty member for failing to revise the content of his course to conform to the specified curriculum so as to insure continuity in course sequence, the institution was sustained (cf. Saunders). Similarly, failure to keep office hours, give proper advice to students and difficulty in interacting with students are evidence of incompetence (cf. Jawa). When a group of students filed a grievance complaining, among other items, that a faculty member was incompetent and that grievance was upheld by both University and Regents decisions, the faculty member was not permitted to ask for any additional assessment of his teaching by his peers (cf. Agarwal). In Bevli dismissal was allowed based on a finding that the faculty member was "unable to employ knowledge of the subject matter at a professional level" (p. 39). Lack of preparation for class, failure to update course materials and keep office hours and ineffective teaching also constitute incompetence providing notice and the opportunity to resolve these problems were allowed (cf. Riggin). In one incompetence case litigating teaching effectiveness issues, the court also cited failure in research and service as additional appropriate evidence (cf. King). Finally, in the only case resolved in favor of a faculty member the court drew a line between a faculty member's misuse of funds in his role as Dean and his competency to teach. The court refused to impute proven dishonesty while functioning as a Dean to effectiveness in the classroom

(cf. Martine). This case would appear to be an exception, narrowly based on simultaneous employment in two roles, to the general pattern of judicial deference to institutional judgments on incompetence.

When insubordination is the reason for dismissal, the courts often face more complex legal issues. This occurs when faculty allege that the words or actions constituting insubordination are speech involving matters of public concern protected by the First Amendment. Termination for exercising rights of speech is not permitted (cf. Perry, Pickering) unless other acceptable reasons for termination exist (cf. Mt. Healthy). Thus, the courts must attempt to discern legitimate from pretextual reasons for dismissal.

Not unexpectedly then it would appear that examination of the larger setting in which the "insubordinate" behavior occurred is important to the outcome of the case. If the faculty member criticizes the quality and effects of an institution's programs and policies and even acts upon such views, the courts may protect such behavior as a matter of general political and social concern (cf. Johnson, Pa.). However, combine such criticism with evidence that the faculty has difficulty in getting along or cooperating with colleagues and the dismissal may well be sustained (cf. Shaw). Possible "other" evidence of employees' shortcomings becomes critical in these cases. In a case where union activity, arguably protected by the constitution, seems to have been an important factor in dismissal, a refusal to comply once with the college's requirement of attending graduation was not viewed as a pretext for dismissal based on speech. Regardless of the minor nature of the infraction, the college "has a right to expect a teacher to follow instructions" (cf. Shaw, p. 932). In this survey this particular holding was the most problemmatic example of judicial deference, when the insubordination is alleged to represent symbolic speech, to an employer's expectation of employee compliance with policies and procedures.

Courts have disallowed claims of interference with academic freedom when a university dismissed a faculty member for disregarding its denial of a request for a period of absence to deliver a lecture abroad (cf. Stastny) and when dismissal was based on the faculty member's efforts to involve students in internal departmental disputes where the

issues were determined not to be of public concern (cf. Harden). Several cases alleging no violation of First Amendment rights appeared to be based on fact patterns involving direct personality conflicts or rejection of administrative authority (cf. Bates, Gross, Kelly). Institutions always prevail in such cases if procedures are adequately handled. It would appear that faculty have the right to disagree but not to be disagreeable in doing so.

Another issue found in insubordination cases is that of whether general statements of cause for dismissal found in institutional policies are too vague or broad, especially when they are used in cases where constitutionally protected speech is implicated. This goes to the concept of notice and of the degree to which specific forms of behavior subjecting a faculty member to dismissal must be identified beforehand. In Adamian, the basic case dealing with this problem, the university's standards specified only that tenured faculty could be dismissed for adequate cause and should exercise appropriate accuracy, restraint and respect for the opinions of others even when not speaking for the University. When faced with litigation arising from a dismissal based on disruption of a university function involving potential violence, a federal circuit court found no overbreadth in its interpretation of this standard as an appropriate time, manner and place regulation. A later case with a somewhat similar fact pattern sustained this analysis and an institutional policy allowing for dismissal based on "personal conduct substantively impairing the individual's performance of his (or her) appropriate function within the university (cf. Franklin, p. 243). Institutions appear to have some discretion in describing adequate cause broadly, in interpreting basic policies and in applying them to specific cases even when questions of protected speech are raised.

As noted earlier, decisions involving neglect of duty as the cause for dismissal often also implicate insubordinate acts by the faculty member. The act which constitutes the neglect of duty is frequently a symbol for some disagreement over institutional policy or procedure. The court found neglect of duty in one instance where a faculty member, who when relieved of teaching duties, failed to complete a subsequent assigned task of devel-

oping two graduate courses (cf. Josberger). In another similar fact pattern with the reassignment in the case being due to low enrollments, a period of illness and departmental allegations of poor teaching, the faculty member prevailed. In refusing to perform the newly assigned duties the faculty member indicated his willingness to carry out his reassignment once a full hearing on competence was held. He denied that his failure to perform his new duties constituted a constructive resignation from employment or neglect of duty. The court required such a hearing (cf. Patterson).

Finally, in the most promising legal analysis of all the cases surveyed, the court remanded a neglect of duty decision to the lower court for a factual assessment of the obligations of institutional administrators to support faculty in enforcing discipline where the faculty member was dismissed for refusal to hold class until the administration disciplined a disruptive student in the class. McConnell is the first case clearly to argue that neglect of duty might be due to a failure by the institution to support the faculty member and to find a mutuality of contract obligations between faculty member and institution. Although the faculty member lost on remand,[2] the decision by appellate court judge, Harry Edwards, noted for his knowledge of higher education law, creates an important precedent for future plaintiffs' attorneys as well as for administrators responsible for faculty development and academic affairs.

The cases dealing with procedural issues also illustrate the substantial leeway permitted institutions in procedures for dismissal. Procedural errors may be attributed both to the institution and to errors in the litigation process. Of the 7 cases either won by faculty or remanded, only 4 involved substantial errors in the institution's handling of the dismissal. Two of these found reason to question the appropriateness of authority relationships in decision-making (cf. Bates, Bowing). Disputes over authority were litigated with some frequency where conflicting conclusions were reached as to dismissal by different levels in the decision-making hierarchy. Generally, the court found few

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[2]This decision on remand was not available at the time this data was gathered and, so, results reported conform with the appellate court holding.

by different levels in the decision-making hierarchy. Generally, the court found few problems with such inconsistencies providing appropriate authority relationships were established. When an institution removed a faculty member from the payroll prior to receiving the results of the hearing panel's decision the court resolved the procedural issue in favor of the faculty member (cf. Clarke).

One procedural issue of differentiating a dismissal from a resignation raised interesting issues for practice. The question as to what constitutes the abandonment of a property interest was addressed by the courts in three cases. Disputes over a leave of absence and resultant failure to report for assigned classes were viewed as a voluntary breach of contract triggering no rights to a hearing on dismissal (cf. Akyeampong, Kaime). However, a constructive resignation could not be imputed to a faculty member failing to complete new tasks assigned after course enrollments declined where some questions as to competence existed (cf. Patterson). Constructive resignation is an argument with limited value as a defense to refusing a hearing on dismissal.

The range of due process arguments found in the cases surveyed was broad. The issue of a faculty member's right to counsel in a termination proceeding is not settled at this point (cf. Johnson, Ala.). Most frequently addressed were general questions of the adequacy of procedural and evidentiary rights in a hearing allowed by the institution. The degree to which an institution would be permitted to deviate in practice from its own procedures or judicial tenets of due process was also questioned. The courts appear to have some appreciation for the complexity of administering quasi-judicial proceedings in institutions of higher education providing the rudiments of fair play and due process are observed.

IV. SUMMARY AND CONCLUSIONS

Review of all litigation involving dismissal of tenured faculty for reasons of incompetence, broadly defined, provides important perspectives both as to patterns of litigation in higher education and as to the role of the courts in disputes over the evaluation of tenured faculty. The methodological approach employed in this survey confirms

the utility to administrators of research aggregating caselaw data in one area of litigation so as to establish patterns. The findings of this research have important implications to guide faculty and administrators charged with faculty evaluation and decision-making in postsecondary institutions. This is particularly true as the mandatory retirement age for faculty is lifted thereby making the need to develop and invoke standards of competence more real (Olswang and Fantel, 1980-81).

First, this survey confirms the growing involvement of the courts in decisions made by higher education institutions. The absence of litigation between 1960-70 and relative infrequency of cases between 1971-75 is notable. A rapid increase in litigation occurred between 1975-85 although this appears to have stabilized. When placed in the larger context of the environment in which institutions of higher education function, the frequency of litigation in this sector of law appears to be low. This methodology, however, has not be applied comparatively to other sectors of education law to ascertain any baseline.

Second, there appears to be some variation in litigation by type of institution. Litigation occurs less frequently in private institutions as well as in community colleges. Doctoral level and comprehensive institutions are involved in litigation at a somewhat higher rate than might be expected. The governance and organizational literatures may provide some explanation for this in factors of complexity, decentralization and collegiality. For administrators in these institutional types this implies the somewhat greater difficulty of insuring adequacy of procedures and standards in such dismissals.

Third, in the cases included in this survey, litigation occurs as frequently in the state as in the federal court system. Since district court decisions at the state level are not readily available, this finding probably points to a somewhat greater vulnerability to suit in state court. Furthermore, there is some indication that plaintiffs litigating in a federal forum may be more prone to appeal. Confirmation of this point requires additional research on litigation rates in state trial courts. Such information may aid administrators in making informed decisions about strategies and costs in decisions to settle or litigate.

Fourth, this survey of the caselaw confirms the relatively strong position of institutions involved in litigation. Institutions prevail over faculty by a ratio of more than four to one in those cases with clear outcomes. This finding does not appear to vary over the period of this study. The courts would appear to accord substantial deference to the employer's assessment of both incompetence and neglect of duty. Only in cases where insubordination is alleged as the cause for dismissal do courts appear to look more closely at the evaluation process to insure that it is not a pretext for dismissal based on protected speech. Even in these cases institutions prevail by a ratio of three to one. While this finding does not obviate the need for development and administration of well thought out standards and procedures for dismissal of tenured faculty, it does illustrate the reluctance of the courts to second guess institutional judgments except in the most egregious cases.

Fifth, the caselaw illustrates the importance of procedural issues in litigating to date. Although not unexpected, this finding illustrates the expanded exposure of institutions, particularly public, to litigation arising out of the procedural revolution of the 1960's and, 1970's. Procedural issues are litigated with some regularity across the period studied. There is no reason to expect any change in this pattern. On the other hand, the courts appear to allow institutions considerable leeway in structuring procedures for hearings on dismissal and to make allowance for minor errors as long as the basic tenets of fairness are present. This finding emphasizes for administrators the critical importance of creating and monitoring procedures insuring basic fairness in any dismissal action while providing some assurance that the courts permit a margin of error. Again although the outcome of these cases illustrates general deference to institutional judgments, procedural errors create a rationale for faculty to sue and incentives for the institution to settle rather than litigate, thereby limiting the costs to themselves of litigation. Even though plaintiffs only obtain some satisfaction in one-third of these cases and winning often means only that the institution must do it again correctly, the incentives for faculty to file suit on procedural errors appears to be high.

Cases dealing with substantive issues alone are less commonly addressed by the courts. Again the results illustrate judicial deference to institutional evaluations about employee performance as well as judicial reliance upon the more traditional approaches of employment law once the constitutional and contractual exceptions are resolved. This explains, in part, the number of cases appearing in the survey which focus on insubordination and implicate First Amendment issues.

Sixth, classification of the cases on dismissal for incompetence broadly defined as adequate cause, into the three subcategories of incompetence, insubordination and neglect of duty sheds some light on litigation patterns and strategies. It also illustrates the limits of the utility of these categories of causes for dismissal of tenured faculty. About one-half of all cases litigated the issue of insubordination while one-third addressed questions of faculty competence in performing teaching or research responsibilities. Again these results illustrate general deference to institutional judgments about employee performance and ability to work cooperatively to promote the institution's interests. The distinctions in the caselaw between incompetence and insubordination appear to be relatively clear cut with the former focused upon actual job performance. However, the distinctions between insubordination and neglect of duty cases are often somewhat ambiguous in the caselaw. The act of neglect triggering dismissal often symbolizes underlying disagreements over policy. In some cases the deliberate disregard of a regularly assigned responsibility may create for the courts and administrators a legitimate, non pretextual reason for a dismissal where disputes involving issues arguably involving protected speech are implicated. Faculty exercising their constitutionally protected rights must be aware of these distinctions. Close analysis of the caselaw shows substantial overlap between insubordination and neglect of duty cases with the assignment to the neglect of duty analysis by the court being outcome determinative.

Seventh, although analysis of litigation patterns shows an increase in numbers of cases, a close review of court reasonings illustrates the general judicial reluctance to second guess institutional decisions in this area. Within constitutional, procedural and

contractual limitations, the courts appear to confirm the employing institution's right to assess quality and evaluate competence. The recent McConnell decision raises a new argument important to both faculty and administrators for policy and practice, however. In ruling that institutions have an obligation to support faculty in the classroom, an important legal argument of mutuality in contract has been established. This decision expands the arsenal available to plaintiff's attorneys and requires administrators to consider both in policy and in practice what obligations the institution has to support faculty in the classroom.

Finally, this research begins to address the issue of the role of the courts in faculty evaluation by looking at litigation in the area of dismissal of tenured faculty for reasons of incompetence, broadly defined. It confirms that institutions appear to retain a substantial discretion both to define standards of cause and of procedure for dismissal. If, as the literature on higher education indicates, institutions are focusing more attention on evaluating the performance of tenured faculty, then continued monitoring of the role of the courts in dealing with this class of cases will provide valuable input into the process of developing appropriate standards and procedures. Research on patterns of litigation assists administrators in minimizing institutional exposure to litigation.

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